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Supreme Court, U.S.
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No. 98-1790

IN THE

Supreme Court of the United States
OCTOBER TERM, 1998

JAMES E. PIETRANGELO, II

Petitioner,

v.

UNITED STATES SENATE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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May 19, 1999

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REPLY BRIEF

Pursuant to S. Ct. R. 15.6, petitioner James E. Pietrangelo, II ("Pietrangelo") submits this Reply to Respondents' Brief in Opposition.

ARGUMENT

In his Petition for Writ of Certiorari, Pietrangelo established that his case presented an important question of federal law that should be settled by this Court, namely the construction of the Oath and the Convict and Remove Clauses of the Constitution in light of the Respondent Senators' ("Senators") violations of those Clauses. The Senators' Brief in Opposition failed to rebut Pietrangelo's Petition.

First, the Senators' entire Brief, rather than opposing the granting of certiorari, actually supports it, in that it argues the *merits* of this case, *i.e.*, issues like standing, political question, and justiciability. Inasmuch as this Court has never construed the Oath and the Convict and Remove Clauses, in the context of the facts of President Clinton's Impeachment Trial, for the Senators to argue the merits of this case in their Brief *to this Court* is to admit that those merits need to be argued *to this Court* – which requires the granting of certiorari. If the Senators can argue the merits of the case before this Court, justice and fair play demand that Pietrangelo – who could only argue reasons for the granting of certiorari, and not the merits of the case, in his Petition – should also be given the opportunity to argue the merits by the granting of certiorari.

And, indeed, Pietrangelo can readily argue the merits of this case. In essence, the Senators' Brief position is that, yes, the 32 Senators demonstrably untruly and unfairly voted President Clinton "not guilty" as to the impeachment articles, and that, yes, the Senate as a whole communicated a judgment of "not guilty" to the House of Representatives even though two-thirds of the Senate demonstrably believed President Clinton "guilty," but, "too bad" and "so what," the

Senators cannot be questioned by anybody about it, including by this Court -- the ultimate defender and interpreter of the Constitution -- much less by a mere citizen like Pietrangelo. However, not only do the cases cited by the Senators *not* oppose review by this Court of the Senators' violations, but, as Pietrangelo stated in his Petition, such review by this Court is necessary for the restoration of all three of the branches – particularly the Judicial Branch.

Art. I, § 3, cl. 6 required that the Senators be on Oath when they voted on the impeachment articles. U.S. Const., art. I, § 3, cl. 6. An "oath" is defined as an "attestation by which a person . . . is bound in conscience to perform an act faithfully and truthfully." Black's Law Dictionary 1071 (6th Ed. 1990). The Oath Clause was inserted into the Constitution by Gouverneur Morris, who believed that, with the Oath, "there could be no danger that the Senate would say untruly on their oaths that the President was guilty [or not guilty] of crimes or facts . . . ." The Records of the Federal Convention of 1781, M. Farrand ed., v. 2, pp. 65-66 (Rev. Ed. 1966). The impeachment mechanism was created, as James Madison and George Mason stated, as the provision "for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate [,]" so that no man is above Justice, particularly that man who can "commit the most extensive injustice." *Id.*, at 65. Or, as this Court has stated, "the Constitution admits that [the President] may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty." Langford v. United States, 101 U.S. 341, 343 (1879). Clearly, the 32 Senators had a constitutional duty to vote "guilty" as to the impeachment articles, because, based on the irrefutable evidence of their Censure, they believed that President Clinton committed perjury and obstructed justice. Our democratic system and the separation of powers depended on that duty. But the Senators clearly violated that duty.

The Senators argue that *Nixon v. United States*, 506 U.S. 224 (1993), prevents this Court's review of the Senators' actions. However, that argument is incorrect. The irrefutable meaning of *Nixon's* holding is that the Senate has the sole power to try

impeachments and that this Court may not review that trial, *as long as* the "three very specific requirements" (including the Oath and Two-Thirds Vote for Conviction) "that the Constitution does impose on the Senate when trying impeachment" are met. *Id.*, at 225-226, 230. However, if those requirements are not met, *Nixon* states, "courts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Id.*, at 238. "As we have made clear, 'whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.'" *Id.*, at 239 (*quoting Baker v. Carr*) (citation omitted) (brackets in original quote). Clearly, this Court has the power *and* the responsibility to review whether the Senators violated the Oath and the corollary Duty to Convict and Remove. Also, thus, under *Nixon*, the Senators' "nonjusticiable political question" argument is also rendered inapposite.

The Senators also argue that the Speech or Debate Clause prevents Pietrangelo from seeking to question the Senate and its Members about their votes in President Clinton's Impeachment Trial. First of all, Pietrangelo is clearly not seeking physically to "question" the Senators about their vote, although he is "challenging" their vote as being unconstitutional. Pietrangelo is not questioning, or inquiring into, and does not need to inquire into, the motivations of any Senators – which is forbidden by the Speech or Debate Clause, *see United States v. Brewster*, 408 U.S. 501, 513 (1972) – because the 32 Senators whose votes are at issue already provided Pietrangelo with an irrefutable public statement of their belief as to President Clinton's guilt as to the impeachment articles – *i.e.*, those Senators sponsored their Censure, in which they stated that President Clinton gave false testimony and impeded evidence in a trial. Second, this Court has *never* yet addressed whether a situation such as presented in this case -- where Members of Congress have violated specific constitutional provisions designed to maintain the separation of powers, and there is no one else to sue but the Members and no other remedy available -- renders the Speech or Debate Clause applicable, and this Court has said so on two occasions. *See Powell v.*

McCormack, 395 U.S. 486, 506, fn. 26 (1969) (where this Court reviewed Congressional violation of the Qualifications Clause); and *Kilbourn v. Thompson*, 103 U.S. 168, 204-205 (1881). Moreover, this Court's Speech or Debate Clause cases reinforce the principle that this Court may review Congressional violations of constitutional provisions relating to separation of powers. *See United States v. Brewster*, 408 U.S., at 509; and *Kilbourn v. Thompson*, 103 U.S., at 199. Clearly, it is at least *unsettled* whether Speech or Debate Clause immunity applies to Pietrangelo's suit, and, thus, this Court has reason to hear this case.

The Senators also argue that Pietrangelo lacks standing to assert his case. First of all, this Court has never yet addressed whether the particular injury asserted by Pietrangelo – deprivation of rule of law, equal protection and justice, due process, and democracy, as a result of the Senators' causing President Clinton to be "above the law" – is a constitutional, concrete, in-fact injury which provides him standing, or is merely a generalized grievance. Therefore, review by this Court to settle the question is clearly appropriate.

Second, even under this Court's current standing doctrine, the injury asserted by Pietrangelo does qualify as cognizable injury, for two reasons. First, since impeachment is the (sole) mechanism for holding the President accountable to the law (realistically, the President, as chief law enforcement officer, and as the Executive, will never be prosecuted), according to the express statements of the Founders and this Court ("no man is above the law"), it necessarily follows that the President actually has to be subject to the impeachment process, *via* the Senators' voting truthfully whether he is guilty or not, to be under the law. It necessarily follows, in turn, that there has to be a mechanism for enforcing the Senators' Oath, should there be a clear violation of it (if there is no clear violation, there can be no mechanism, because the trial is committed to the Senate exclusively, per *Nixon*, *supra*). It necessarily follows, in turn again, that a citizen suit before this Court is that mechanism for remedying a clear violation of the Oath. This Court, because the other two branches have disqualified themselves by their violations.

A citizen, because, again, the other two branches are disqualified, and some one must have standing. Although that no one would have standing is not necessarily a reason to find standing, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 228 (1974), in this case it is, because this Court could hardly have stated that "no man is above the law" for two-hundred years only to say, now that that principle has been put to the test, that it is not true and that, in fact, there is no mechanism for holding the President accountable because "no one has standing." No President would ever really be in jeopardy of being convicted and removed if that were the case – which is exactly what President Clinton and the 32 Senators who untruly voted for him are hoping for, since, in his case, his perjury and obstruction of justice were plainly evident and admitted by the 32 Senators.

Second, Pietrangelo has clearly alleged a personal stake in the outcome of this case -- deprivation of rule of law, equal protection and justice, due process, and democracy. If Pietrangelo, or any other American, committed perjury and obstruction of justice, he would not only be subject to trial and conviction, but he would most likely be tried and convicted (as evidenced by the number of Americans who are each year). Yet, President Clinton, by pure virtue of his office as President and by virtue of the violation of the Senators of the Oath and Duty to Convict and Remove Clauses, is immune from that jeopardy and penalty. That is irrefutably contrary to the philosophy behind the establishment of the Constitution. As Montesquieu, from whom the Founders borrowed, put it, "[L]iberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have the same power." The Spirit of the Laws, A. Cohler *et al.* eds. & trans., p. 155 (1989). Or, as President John Adams put it:

> The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in

> framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may, at all times, find his security in them.

The Works of John Adams, C. Adams ed., v. 2, pp. 219-220 (1851). The Oath and Duty to Convict and Remove Clauses thus provide a direct cause of action for any citizen for their violations, because each citizen, with the compact being broken, has lost his liberty, and is entitled to restore it.

Pietrangelo also may seek redress under the Fifth Amendment. The Fifth Amendment provides a direct cause of action for government violations of a person's equal protection and due process rights. *See Davis v. Passman*, 442 U.S. 228, 229 (1979). The Senators' exempting President Clinton from the operation of the law while leaving Pietrangelo (and all other citizens) subject to it, merely because President Clinton is President and the Senators' ally, both arbitrarily discriminates against Pietrangelo and deprives him of due process, as much as if the Senators had passed a law treating Pietrangelo differently from other citizens or from the Senators and President Clinton because he is white and catholic, or because the Senators simply did not like him. The Senators' actions make ordinary, hard-working, law-abiding citizens feel like their lives and contributions to society intrinsically do not mean anything, or as much, as, say, a popular politician's (even though that politician is, for example, a draft-dodger and pot-smoker) – the same feeling that a serf in England felt under some "god-king" who enjoyed popularity among nobles and certain cliques and who could do no wrong and engaged in every wrong.

Standing for Pietrangelo, directly under the Oath and Duty to Convict and Remove Clauses, and under the Fifth Amendment, is completely consistent with this Court's standing cases. First, the type of standing that this Court recognizes in cases like *Schlesinger*, *supra*, is meant to provide a "working modus operandi" for our society and government. As any reasonable person will recognize, because government is composed of humans, and humans are

imperfect and not omnipotent, any government of, for, and by the people will occasionally make mistakes or have differences of opinion with its citizens. If every citizen could sue for every little mistake or difference of opinion, government would be so burdened as to be incapable of performing. Thus, generalized grievances are not actionable, because, although the mistake or disagreement has occurred, the general structure of the government -- *i.e.*, the three branches -- is still intact, and is still providing the overall, fundamental, values of government. However, in this case, this Court is not dealing with a mistake within the intact structure of the three branches, but is dealing with a definitional break in the structure itself, because President Clinton has assumed the powers of all three branches and has been allowed to do so by the Senators. Moreover, this case is different from *Schlesinger*, in which the petitioners were challenging the reserve status of several Members of Congress. The power of the President is substantially far greater than the power of several lone Members of Congress, the constraint of whose independence by their alleged violation of the Incompatibility Clause was never actually established and was, therefore, truly abstract. *Schlesinger v. Reservists*, 418 U.S., at 225. The structure of the branches was never really affected. In this case, the President clearly violated the constitutional system, and the injury to every citizen is direct, immediate, concrete, and conspicuous. It is also very real, as opposed to abstract, and very judicially manageable, as opposed to amorphous, since this Court itself has spent two-hundred years breathing life into its supporting principle that "no man is above the law." Clearly, Pietrangelo has standing to assert his case.

Finally, in opposing the granting of certiorari, the Senators argue that this case is not an exceptional one meriting this Court's taking hold of it before the Court of Appeals has rendered its judgment. This argument is also incorrect. This case is the walking definition of "exceptional." It deals with the most fundamental values of this Nation and with the powers of all three of the branches. If Pietrangelo's argument succeeds, President Clinton will be removed. If Pietrangelo's argument fails, this Nation will have to finally accept a perjurer, an obstructer of justice, and an alleged

rapist as its President. Whatever is to be the ultimate outcome of this case, it is best to have it decided now with the greatest of dispatch -- which would require that this Court, the court best equipped to answer constitutional questions, hear it immediately -- rather than to leave it yo-yoing in the courts below. There is no question that this Court will have to decide whether or not to hear it, anyway, because it is at its front door already. Finally, this Court could easily decide this case, since it is virtually ready-made, the Censure and the facts of the impeachment trial already being a matter of public record and judicially noticeable by this Court. Clearly, this case is begging to be heard.

CONCLUSION

For the foregoing reasons, the Senators' Brief in Opposition is not well-taken, and certiorari should be granted to Pietrangelo.

Respectfully submitted,

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